No. 671.

IN THE

Circuit Court

OF THE

UNITED STATES

Ninth Circuit

SOUTHERN DISTRICT OF CALIFORNIA

Charles D. Lanning, Receiver, &c.,
Complainant,

vs.

H. C. Osborn et al.,
Defendants.

Complainant's Brief in Support of Exceptions to the Answer.

WORKS & WORKS,
Solicitors for Complainant.

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The questions arising upon the exceptions to the defendant's answer were orally argued. At the close of the argument it was suggested by the court that the solicitors for the respective parties file a statement of their points and authorities.

It was not supposed by us that it was intended that the case should be again argued in full, and, acting upon the request of the court, we filed a brief statement of the main points upon which we relied, with a citation of the authorities, and without any extended argument of any of the points made. But the learned solicitors for the defendants have evidently taken a different view of what was desired by the Court, and have filed extended briefs, one, alone, of which covers sixty pages of printed matter We find it necessary, therefore, considering the importance of the matters involved, and the full and able written presentation of their side of the case by the solicitors for the defendants, to re-discuss the questions that were orally argued. And, in order that our entire argument may be put in printed form, for the convenience of the Court, we first set out in this brief the points and authorities filed by us in the opening. They are as follows:

"Complainant's Points and Authorities in Support of Exceptions to the Answer.

I.

The remedy of the defendants, if the rates established by the company are unreasonably high, is by petition to the board of supervisors, as provided by statute for the establishment of such rates by the board. This is an adequate and speedy remedy, provided by law, and must be resorted to before seeking relief from a Court of Equity, or by separate actions on the part of

individual consumers to compel the company to supply the water.

Const. Cal., Art XIV, Secs. 1 and 2;
Stat. 1885, p. 95, Secs. 1, 2, 5, 6, 10.

II.

The only contracts, alleged in the answer, between the company and consumers, specifically provide that such consumers shall pay the annual rates "*allowed by law and charged by the party of the first part*" or "*at rates fixed by the party of the first part as allowed by law*" or, to "*pay the party of the first part the current rate therefor established for Chula Vista,*" or to "*pay for the use of the water at the current rates as may be enforced from time to time for supplying water.*"

Answer p. 15, line 27; p. 18, line 7; p. 19, lines 8 and 16.

No other contract is alleged in the answer and these clearly contemplate the fixing of rates by the company; but all such contracts are subject to the establishment of rates as provided by statue. In those cases they do not attempt to, nor could they, fix an unalterable rate, but simply bind the parties to pay the rates fixed by the company as provided by law.

III.

But no such contract was necessary. The statute provides, distinctly in what manner rates may be established, viz. 1, by the board of supervisors; 2, by the company itself. But the rate established and collected by the company can only stand until rates are fixed by the supervisors, which can only be done at

the instance of the consumers and cannot be done at the instance of the company. The only protection of the company is its right to fix its own rates. The protection of the consumer lies in his right to have the rates fixed by the company set aside by the supervisors, and other rates substituted.

Statute 1885, p. 96, Sec. 5.

And rates established by the supervisors *may* be changed, each year, on the petition of either the consumers or the company, and when rates established by the supervisors are abrogated without the substitution of others the right to fix the rates again revives in the company.

Stat. 1885, pp 96, 97, Secs 5, 6.

IV.

The rates fixed by the company are changeable by it the same as by the board of supervisors. This is not expressly provided for by the statute but the whole tenor of the statute indicates it and the necessity of changing the rates, to meet new conditions and circumstances, is necessary for the protection of both the company and its consumers.

V.

The statute declares what shall be reasonable rates, if fixed by the supervisors, viz : such rates as will return to the company not less than six, nor more than eighteen per cent., net, on the value (or cost) of the plant.

VI.

If this court has jurisdiction to, or will, where an

express statutory provision, giving a speedy and adequate remedy at law exists, inquire into the reasonableness of rates fixed by the company, then the court must be bound by the legislative declaration as to what shall be a reasonable rate, and unless it is shown that the rate of $7.00 per acre, per annum, will return more than six per cent., net, on the value (or cost) of the plant, the statutory provision is conclusive that the rate is reasonable, and if it will not exceed eighteen per cent, net, it must be regarded as *prima facie* reasonable. But as to the latter it is unimportant as it will not be contended that the rate will realize to the company the minimum sum, or one-half, or one-third of it.

VII.

Assuming that this court has jurisdiction to, and will, inquire into the reasonableness of the rates, it cannot fix or establish rates. Its jurisdiction extends no farther than to determine whether the rates fixed by the company are, or are not, reasonable.

Regan *v.* Farmers Loan & Trust Co., 154 U. S. 420; 14 Sup. Ct. Rep. 1047, 1054;

Chicago & G. T. R'y Co. *v.* Wellman, 143 U. S. 339, 344; 12 Sup. Ct. Rep. 400, 402.

VIII.

The company is not estoped to change the rate by reason of the fact that it has established and collected a lower rate nor by representations made that such low rate would be maintained, nor can the consumers have any prescriptive right to an unreasonably low

rate. This results, necessarily, from the law declaring that the use of the water is a public use, "subject to the control of the state *in the manner prescribed by law*;" (Const. Cal. Art. XIV, Sec. 1), because the right to collect rates "*cannot be exercised except by authority of and in the manner prescribed by law*;" (Const. Cal., Art. XIV, Sec 2) and because the manner in which the right shall be exercised and the rates fixed *has* been "prescribed by law."

Stat. 1885, p. 95.

And if it is once admitted by the courts that the subject of annual rates can be controlled by representations made by the company selling and distributing the water, or by the consumer, or even by positive contracts between them, the very purpose of the adoption of the constitution, and the enactment of the statute, will be wholly defeated. It was the undoubted purpose and object of both to deprive corporations dealing in water of the power to fix its rates by contract. This time the representations sought to be used as fixing the rates for all time may afford a better protection to the consumer than the constitution and statute. But next time the contract, or representations constituting an estoppel, may be more favorable to the *corporation* than the *law* would be, and then what? The power to fix rates by contract or representations, once admitted, the right must necessarily exist in all cases, and the obligation thereof must be mutual. If instead of the facts alledged in this answer, that the consumer bought his land at a *high* price in consideration that water therefor would

be furnished at a low rate, it should be shown in this or some other case, that he had bought his land at a *low* price in consideration that he would pay a *high* rate for his water, what then? If one would be legal and binding the other would. And if either can be held legal and binding our constitution, so far as it relates to this subject, counts for nothing. And if neither of the parties can be bound to a rate by positive contract, certainly neither could be legally bound, indirectly by representations, or estoppel. Both parties must know the law, and the law is that the rates can only be fixed as prescribed by law, that the manner has been prescribed, and that the prescribed manner is not by contract or estoppel.

As to the effect of a rate having been established and collected by the company, it has been considered above. The same reasons which prevent the fixing of a perpetual rate by contract must prevent the establishment of such rate by mere lapse of time, or prescription.

IX.

The denials are insufficient to meet the allegations of the bill. They go no farther than a denial in part of the amount expended in the construction of the plant beyond the sum of $750,000; deny that in order to pay six per cent. interest on the value of the plant and operating expenses, it is necessary to raise more than $73,000 by the rates; deny that the amount of revenue that can be realized from the present rates is less than $27,000; and deny that a rate of $7.00 per annum per acre is a reasonable rate, *not absolutely*, but because:

1. Each of the defendants is the owner of a perpetual right to the water, and therefore the company is not entitled to any interest on its investment as to them; 2. The rate of $3.50 per acre has been actually established and collected. They deny that any increase of rate is necessary, *not to pay the company any compensation for services in supplying the water or as interest on its plant, but to operate and maintain the plant.* "These denials are unquestionably evasive and do not meet the issues presented by the bill. To hold them sufficient the court must hold that it is only necessary that the rates shall return to the company the bare amount it is compelled to expend in operating and maintaining its plant, and that it must furnish the plant, be responsible for its management, and run all risks incident to such management, for nothing. We expressed our views on this subject at the oral argument and will not weary the court with a mere repetition of what was then said.

X.

The fact that the company constructed the plant in part for the benefit of its own lands, and to enable it to sell such lands, or that its own lands have been enhanced in value thereby, or that it has realized a profit on such lands because of the water having been brought upon them, by the expenditure of its own money, cannot affect its right to annual rates or the amount of such rates. If the board of supervisors were called upon to fix the rates, could it go into an accounting of the company's affairs in its land department to see what it had actually realized on its lands

in order to arrive at just rates? If so no doubt such an investigation would prove that the company has lost money, has become insolvent, and, because of its insolvency, is now in the hands of a receiver. But neither this court nor the board of supervisors could allow it greater rates because of its failure to sell its lands, as expected, in order to make good its losses, nor could they reduce its annual rates becaase it had made a profit on its lands. The whole matter of the company's profits, or losses, on its real estate, is a false quantity in the fixing of rates. It has nothing to do with the cost of the plant, its value, its operating expenses and maintenance, or the value of the services rendered in furnishing the water to consumers, and these are the things made material by statute in fixing the rates "as prescribed by law."

We have given our views, fully, on this subject, in the printed brief filed in the case of San Diego Land & Town Co. *v.* National City, just decided by this court, of which brief the solicitors for the defendants have copies. We respectfully ask to be allowed to refer to what is said in that brief, pp. 6-10, and make the same a part of these points. Also to pp. 9-12 of the reply brief in the same case. The question whether the matters here refered to were proper to be considered in fixing rates was directly presented and fully argued on both sides in that case, but was not decided.

XI.

What should be considered in arriving at just and reasonable rates?

We maintain that the following things should be taken into account:

a. The cost of the plant.

b. The cost per annum of operating the plant, including interest paid upon money borrowed, and reasonably necessary to be used in constructing the same.

c. The annual depreciation of the plant, from natural causes resulting from its use.

d. A fair profit to the company over and above these charges, for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis.

Ames *v.* Union Pac. R'y Co., 64 Fed. Rep. 165, 177;

Chicago & N. W. R'y Co., *v.* Dey, 35 Fed. Rep. 866, 879;

Stat. 1885, p. 196, Secs. 4, 5;

Stat. 1881, p. 55, Sec. 3;

San Diego Land & Town Co. *v.* National City, decided by this court May 4th, 1896.

The last case cited agrees with us as to these different elements being the proper basis for the fixing of rates, except that it holds that the *present value* should be taken instead of the *cost*. It is immaterial in this case whether the present value or the cost is taken, but we respectfully submit that the taking of the present value is both impracticable and unjust. In the opinion it is said: "In the solution of that problem many considerations may enter; among them

the amount of money actually invested; but that is by no means of itself controlling, even where the property was, at the time, fairly worth what it cost. If it has since enhanced in value, those who invested their money in it, like others who invest their money in any other kind of property, are justly entitled to the benefit of the increased value. If on the other hand the property has decreased in value, it is but right that those who invested their money in it, and took the chances of an increase in value, should bear the burden of the decrease. In my judgment it is the actual value of the property at the time the rates are to be fixed that should form the basis upon which to compute just rates, having, at the same time, due regard to the rights of the public, and to the cost of maintenance of the plant and its depreciation by reason of wear and tear. If one has property to sell, it is its present value that is looked to, one element of which may very properly be its cost; but one element only. So, too, if one has property to lease, it is its present value, rather than its cost, upon which the amount of rent is based. And, if, as said by Mr. Justice ~~Bower~~ Bruce in Ames *v.* Northern Pacific Railway Company, *supra*, the public were seeking to condemn the property in question for a greater public use, if that be possible, its present value, and not its cost, is that which the public would have to pay. It follows, I think, that where the public undertakes to reduce the rates to be charged for the use of such property, it is its present value, and not its cost, that must be taken as a basis upon which to fix reasonable and just rates, having due regard to

the cost of its maintenance, to its depreciation by reason of wear and tear, and also to the rights of the public. If, upon such a basis, a fair interest is allowed, no just cause of complaint can exist."

We submit that this basis is impracticable because there is no means by which it is possible to arrive at the value of the plant. It is not the subject of barter and sale in competition with other property of a like kind. Therefore it has no market value. It is largely underground and its condition cannot be ascertained The revenue that can be realized from it, which alone constitutes its true value, depends upon the rates fixed for water, each year, by some one else, and about which the owner of the property cannot contract, and over which he has no control. The commodity in which he deals is not his own, he is a mere agent of the public in appropriating and delivering it. It is not intended that he shall *speculate* in the property. But to say that the person or corporation who owns the property shall bear the loss, in rates, if the property decreases in value, and is entitled to an increased rate if the property increases in value, is to make the matter of securing water rates one of speculation, merely, and does not make them depend, as we submit it should, on the real services rendered by the company to the public, for whom it acts, in the investment of its money in the appopriation and storage of the water, and its services rendered in distributing it to consumers. And what is to be taken into account in arriving at the *value?* Is the water right of the company, or the water stored by it to be considered? If so, how

can the value of the water rights, or the water, be ascertained, and what is the interest of the company in what the constitution makes a public use? We contend that the only tangible and practicable basis for fixing the rates is the amount the company has actually and reasonably expended for the benefit of the public it serves. This basis puts every company on an equal and fair basis, not depending upon speculation or guess work. There can be no analogy between a company dealing in water, and whose price must be fixed by some one else,and a business man, the value of whose property may depend largely upon his own skill and judgment in the management of it, and who can rent, lease, or sell it, or not, as he pleases and demand such prices for it as he pleases, and who is not, like a water company, compelled to take the price offered him whether fair and reasonable or not. We still entertain the conviction that the money properly and necessarily invested is the true test and the hope that your honor will, upon a more careful and thorough study of the question, so determine. It is a question of vast importance and deserves the most careful consideration.

As to the item of natural depreciation. That such depreciation should be considered is distinctly decided in the opinion referred to. But at the oral argument it was intimated from the bench that this would be made good by the amount allowed for money actually expended for repairs. But to any one who has familiarized himself with the actual workings of a water plant, consisting of pipes underground, this

will appear at once, to be wholly impracticable and unjust either to the company or the consumer, or both. The entire pipe system is going to decay gradually. This depreciation cannot be made good by repairs. The pipe may be patched and banded, when leaks occur, which constitute repairs in the legitimate and proper sense. But, sooner or later, the pipe becomes so decayed that the whole line must be replaced. In the case of the San Diego Water Company of San Diego, which we take as an illustration of our meaning, this has actually occured. On one of its main pipe lines leading into the city, leaks have been occurring from time to time and the company has been placing bands on the pipe and resorting to other means to stop the leaks. But the pipe has become so decayed and full of "pin holes" that "repairs" will no longer answer the purpose, but the entire pipe line must soon be replaced by a new one. This will cost probably $40,000. If this large expenditure must be made would it be just to charge it up against the consumers as repairs for this year? If so the operating expenses would be just about doubled If charged as repairs of course the whole of it must be paid by the consumers. If it is new construction, and the company has not, in all these years, been allowed anything for the depreciation that has gone on, and which has finally compelled it to make this large expenditure, it is just $40,000 the looser. The percentage of depreciation is no longer a matter of speculation or guess work. It has been demonstrated by actual experience to a reasonable degree of certainty. It is far easier to

determine with justice to the company and the consumers than the present value of the plant. If it is once declared that such replacements of pipes are legitimate repairs then consumers must suffer the consequences, and, as these underground distributing systems grow older, the burden imposed for such repairs will be unbearable. The only just and fair method of meeting this loss is to add to the rates of each year a proper amount to meet this depreciation and leave it to the company to make the additions, when necessary, *as construction*, and not as *repairs*.

XIV.

The amount in controversy, as between the complainant and one defendant, is not the test of jurisdiction in this court. A suit against all of the consumers is the proper one to bring. The question cannot properly be litigated between the receiver and each consumer separately.

Chicago M. & St. P. R'y Co. *v.* Minn. 134 U. S. 118; 10 Sup. Ct. Rep. 702, 703.

In the case cited Mr. Justice Miller, in his concurring opinion, states the rule as follows:

"6. That the proper, if not the only, mode of judical relief against the tariff of rates established by the legislature, or by its commission, is by a bill in chancery asserting its unreasonable character, and its conflict with the constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

"7. That until this is done it is not competent for each individual having dealings with the carrying corporation or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method."

With respect to the question whether we have, by our bill, shown sufficiently that we are entitled to sue in this court, on the ground of the danger of the multiplicity of suits, we deem it better to wait until we hear what is said by the other side before taking it up. But we do not wish to be understood as admitting that the threatened multiplicity of actions is the only reason for coming into this court. On the contrary if no such suits were threatened, either the company or the receiver could bring all the defendants before the court, in one suit, to settle the question of its right to establish and collect the rate now in controversy."

I

Novelty of the Position Taken by the Defendants.

The learned solicitors for the defendants are somewhat at variance as to the grounds upon which they should attempt to defeat the complainant's right to collect the new rate the company has established. Hence the necessity of three separate briefs, one by each solicitor, separately, instead of one joint brief. But upon some things they do agree, viz: that in their judgment the San Diego Land and Town Company is not

a *public* corporation but a *private* one; that the waters of the Sweetwater river, appropriated by the company, are not held by it as a *public use*, but are its own private property; that the sale and distribution of the water is not subject to the provisions of the constitution and statute making the use of all water appropriated for sale, rental or distribution a public use, and subject to the regulation and control of the state, and prescribing how the rates therefor shall be fixed, but that the sale of such water is the subject of private contract wholly free from said constitutional and statutory provisions. This is a most singular position for water consumers to take. The laws from which they are struggling to escape were enacted solely for their benefit and protection, and to limit the powers and rights of corporations to take up the waters of flowing streams, and make such waters their own private property. But the exigencies of their case have driven them to this hitherto unheard of position. And what a selfish and untenable position it is! Here are a mere handful of consumers attempting to establish a doctrine, not only subversive of the constitution and laws of the state, but in direct opposition to the interests of thousands of other consumers throughout the entire State of California. And this because they claim they have made contracts with the company, or the company has made representations, that will compel it to furnish water to them for less than it is worth, and on such terms as will be absolutely ruinous to the company. Not only this but they seek to establish the doctrine that as to all other

property owners under the system, not yet supplied with water, the company may refuse to furnish them water unless they will contract with it to pay such rate as it may fix, without limitation, and that they can have no redress under the constitution or statute in the way of having the rates fixed by the public authorities. Such an outcome would be entirely satisfactory to the company, if we believed it could be finally maintained and upheld, not only as between the company and the consumers now before the court, but as to all consumers. But we shall attempt to show, hereafter, that this must be impossible under the law and under the express allegations of the bill of complaint and answer, as to the nature of this corporation and the purposes for which it was organized.

With these few preliminary observations we pass to a discussion of the specific points made and argued by the defendants. And first we address ourselves to the brief of Messrs. Haines & Ward.

II.

It is said in very general terms, and without argument, that an exception for impertinance must be supported *in toto* or it must fail, and, that, therefore, exception "First," numbering 47 paragraphs, and exception "Seventh," cannot be supported.

But both of these exceptions set out the different parts of the answer claimed to be impertinent, separately and numbered, and each of said parts are excepted to severally and separately. This amounts to a several and distinct exception to each of these separate parts, and may each be ruled upon separately.

III.

The second exception is claimed to be a pure misapprehension on our part "of the theory upon which one class of the defendants have pleaded the purchase from the company of lands, with the appurtenant easement in its diverting and distributing system; and upon which another class of defendants, not purchasers of land from the company, have bought easements under the form of contract set forth on pages 17 and 18 of the bill (answer)."

We could only judge of the "theory" upon which these facts were alleged from the facts themselves, and took the one indicated by the exception, as the most reasonable, in fact the only reasonable one. But, as the learned solicitors, who are also consumers and defendants, expressly, and with some warmth, repudiate any intention to urge such a defense, and the only one, we believe, that could be supported by any show of reason, the discussion of that view of the subject may as well be left out of the case from this on.

IV.

Unfortunately the solicitors, whose brief is now under consideration, are defendants in this action, as well as solicitors, and their brief is characteristic of a party, rather than an attorney. They cannot look with judicial fairness upon the questions involved, and their whole argument is tinged with a tone of bitterness that is not pleasing. And we must say, with all respect for the gentlemen who wrote this brief, and for whom we entertain the most kindly feelings, that their brief is the most remarkable pro-

duction, and advances the most unheard of, or hitherto unsuspected, theories (for they are but theories) on these important water questions that have yet come to our notice. And if they can be maintained, not as mere theories, but as actual law, the constitution of this State, and the statutes enacted under it, for the protection of the waters of this State will be no better than so much blank paper. And this remarkable position is attempted to be maintained upon the grounds: *First*, That the company claims to have the unlimited right to fix its own rates until the same are fixed by the board of supervisors, as provided by law; *Second*, That to leave the fixing of the rates to the board of supervisors is to put it in the hands of a public body which will be corruptly influenced by the corporation to fix unreasonable rates; and *Third*, That to put this power into the hands of such board is to "extend the power of taxation in a new and subtle form."

As to the first of these it has never been claimed by us that the company has the power to fix the rates *without limit*. We concede that the rates must be *reasonable*. But our first contention is that the remedy, if the company establishes an unreasonable rate, is for the consumers, or other citizens, to apply to the board of supervisors to make reasonable rates. The right to apply to the board of supervisors is given to the citizens alone, and not to the corporation. Why? Because, *until the rates are so fixed, it is given authority to establish its own rates.* This being so no necessity for an application by it, in the first instance, can exist.

But the moment it establishes what the consumers regard as an unreasonable rate they may apply to the board of supervisors to fix such rates and thereby abolish the rates established by the company. And if the board of supervisors fix an unreasonable rate the consumers, or the company, may appeal to the courts, and, if the rates are found by the court to be unreasonable, have the same set aside. The statute itself is the strongest argument in favor of our position that until the rates are fixed by the board of supervisors the company may establish and re-establish its own rates. If this were not so the statute would give to the company, as well as to the consumers, the right to apply to the board. But it does not. It limits the right to the consumers for the very good reason that until the rates are fixed by the board the company may establish and change its own rate. And this is evident from the further provision that after the rates are once fixed by the board *either* the consumers *or the company* may, after the expiration of one year, apply to have the rates changed or abrogated.

Stat. 1885, p. 97, Sec. 6.

We do not appreciate the assumption, so warmly urged by counsel, that the submission of the rates to the board of supervisors, a body representing the persons making the application, and elected by them, is unjust or unreasonable, or that it will or can, work any hardship on them. Either the consumers, or the company, may, as we contend, apply, ultimately, to the court to determine whether the rate is reasonable

or not, and if not, to have it set aside. But until the board of supervisors has acted there is nothing upon which a court of equity can proceed, further than to declare the right of the company to collect the rate itself has established, and to prevent the consumers from harassing the company by a multiplicity of actions at law to prevent the collection of the rates when they have not resorted to the remedy given them by statute. The doctrine that a court of equity will not aid a party where he has a plain, speedy and adequate remedy at law, is too well established to require the citation of authorities to support it. And this case, so far as it calls for a decision in favor of the defendants, as against the rates established by the company, is clearly within the doctrine stated.

With respect to the second ground urged by counsel it can hardly be assumed by this court, as a ground upon which to relieve the defendants from the effect of laws enacted for their benefit, that the San Diego Land and Town Company would corrupt the board of supervisors to procure action favorable to it, or that the members of the board would be, or are, susceptible to such influences. Such an argument is an insult to the parties concerned and to the intelligence of the court.

The third proposition that the power given the board of supervisors to establish the rates is an "extension of the power of taxation in a new and subtle form," we confess we do not understand. It cannot be consistently claimed that a consumer is entitled to be furnished with water, by and through the plant

of the company, for nothing, although, as we shall show farther on, this is the real position taken by the defendants. They must certainly pay something for the furnishing of the water to their lands. The law has, for their protection, provided how the rates shall be fixed by the public authorities, in case consumers are not satisfied with the rates established by the company. We do not understand upon what ground this can properly be characterized as a new and subtle species of taxation, or be held to be unjust to the consumer.

It must be borne in mind that all of this line of argument is based solely upon what *might* be the result to the consumers, and that neither in the answer of the defendants, nor in the long and able briefs of their solicitors, is it alleged or claimed that the rates established by the company and sought to be upheld in this suit are unreasonably high. Their sole contention, throughout, is, not that the rates established by the company are unreasonable, but that it has made contracts and representations by which it is bound to furnish the water, not at a reasonable rate, but at a continuous loss, and that by purchasing land from the company some of the defendants have acquired the right to have the water furnished to their lands for the bare cost of operation. In other words, that, for the services in supplying the water, and the use of its plant for that purpose, and the gradual wearing out of the plant, in the service of the consumers, the company shall receive nothing. This is their whole case, stripped of the verbiage, subtlety, and abstruse reason-

ing of the solicitor who wrote the brief we are now answering and of which he is a master. In his tortuous efforts to establish a doctrine so utterly unreasonable and unjust, we will attempt to follow him. We have said this much in order to remove from the discussion of the real questions involved, his assumption that to apply the plain and explicit law to this case would result in hardship, and that therefore the court should disregard the law and give these defendants some special relief that could not be extended to other suitors.

V.

In the fifth subdivision of their brief counsel attempt to maintain that certain of the defendants have acquired from the company a servitude in its entire system by the purchase from it of certain of its lands, and that the right thus acquired entitles them to the continuous flow of the water, and vested in them an easement in the distributing system and reservoir and dam, and entitles them for all time to receive the water through the system upon payment of the bare operating expenses. Their position is stated as follows:

"When it sold and conveyed parcels of its lands to certain of these defendants, unless the grants contained an express reservation of that portion of the corporeal estate which consisted of the water supply led upon the land, such supply passed with the land. Upon familiar principles, so much of the pipes as lay within the boundaries of the granted land, passed with the fee and in fee; and as to the reservoir and so much of the conduit as led up to and lay outside the boundary of such land, upon the severance, there sprang up a relation of servient estate to the land granted, as the dominant estate; in other words, the servitude upon the water system, so far as such system was not actually within the land granted, passed by the grant as an appurtenant easement; and it passed without express mention, and even without the use of the term 'appurtenant' in the deed."

Numerous authorities are cited to support this novel contention. But the authorities referred to apply not to *quasi* public corporations, selling and distributing water under the constitution, but to private sales of land and water where the seller is the *private owner* of the water he sells as well as the land to which the right to the water is appurtenant. The doctrine that a water right held in private ownership, and attached to real estate, passes as an appurtenant upon a conveyance of the land, is so well settled that the learned discussion of the subject, by counsel, and the citation of authorities, was wholly unnecessary. The trouble is that both the discussion and the authorities are foreign to the facts and issues in this case, except upon the theory of counsel that the San Diego Land and Town Company is a private corporation and owns the water rights to the Sweetwater river, not by appropriation for public use but as a private individual, and for its own private use. Besides, it does not appear by the answer, and as matter of fact it is not true as to most, if not all, of the defendants, that *at the time they secured their conveyances from the company* the water had been placed upon or become appurtenant to the land they purchased. On the contrary they took the water from the company as an appropriator of water for the public use, placed it upon their lands themselves, and have ever since paid an annual rental therefor, and in every way treated and regarded the company as an appropriator of water for sale and distribution under the constitution and laws of the State. We do not mean to be understood that by the application of the water to their lands, whether the

same was applied before or after they purchased the same, the defendants acquired no rights to the use of the water. But it was in no sense such a right as they now claim. The right they obtained is clearly defined by Section 552 of the Civil Code of this State. The effect of this and other provisions of constitutional and statutory law, affecting the rights of the parties, will be considered in reply to other parts of the brief of counsel. It is enough to say, in this connection, that the right given a land owner, by applying the water to his lands, whether he purchases the land from the company or not is the right to the continued or perpetual flow of the water "*at such rates and terms as may be established by said corporation in pursuance of law.*"

Civil Code, Cal. Sec. 552.

The terms upon which the land owner is entitled to the perpetual flow of water remains the same as it was originally, under the section cited, except that by the constitution and statutes, since enacted, the rates to be paid may, at his instance, be fixed by the public authorities, in which case he is bound, in order to preserve his right, to pay the rates so fixed, instead of the rates "established by said corporation in pursuance of law."

Stat. 1885, p. 95.

And as this right to the perpetual flow of the water, on the terms prescribed by law, is not assailed in this suit, the whole discussion, relating to such right, is outside of the issues and only tends to cover up and

confuse the real questions involved. We do not controvert their claim that they have a water right but contend that it is conditioned upon their paying the company a reasonable annual rate for the water used. And whether the annual rate fixed by the company is or is not a reasonable one, is the only question in the case, provided the defendants have the right to call upon this court to determine this question before applying to the board of supervisors for relief. If not the complainant has the right to have it so determined and to an injunction preventing the defendants from harassing it with a multiplicity of separate actions at law to prevent the company from collecting such rates. The questions are wonderfully simple but the argument of counsel is so abstruse, and beside the subject, as to be incomprehensible to the ordinary mind. It may be said, with perfect truth, that unless this court shall hold that the San Diego Land and Town Company is a private corporation, dealing with water appropriated by it as such, every word said in the long brief of counsel is immaterial, and aside from the questions involved in the issues. And it is equally true that if it is shown to be a private corporation, and not subject to the constitution and statute, respecting rates, it is only necessary for the defendants to prove that fact, in order to defeat the complainant's cause of action, as his bill proceeds wholly upon the theory that it is a public corporation engaged in selling and distributing water to the public, and everything else in their brief is superfluous.

VI.

This brings us to the question, discussed by counsel, as to the effect of Article XIV of the constitution of California and the statute of 1885. It may be said, at the outset, that if the Land and Town Company is a private corporation, and has been dealing with the defendants as such, the article of the constitution and the statute referred to, have no bearing whatever on the rights of the parties. It is only such waters as are "*appropriated for sale, rental or distribution*" that are declared by the constitution to be "*a public use*"

Const. Cal. Art. XIV Sec. 1.

It is only the "right to collect rates or compensation for the use of water" so appropriated that is declared to be a franchise that "cannot be exercised except by authority of and in the manner prescribed by law."

Const. Art. XIV, Sec. 2.

And it is only the sale and distribution of water so, and for such purpose, appropriated that is attempted to be regulated by statute.

Stat. 1885, p. 95.

Therefore the first inquiry in the orderly and logical discussion of this question must be: Was the water in controversy "*appropriated for sale, rental or distribution* is the same "*a public use*" and "*a franchise that cannot be exercised except by authority of and in the manner prescribed by law?*"

If not these constitutional and statutory provisions do not affect the rights of these parties in the least. Their

rights must be controlled by the law, as it exists, independently of these provisions.

Of course upon the exceptions to the answer, the question as to the nature of the corporation, and its rights in the waters appropriated by it must be determined from the allegations of the bill and answer alone. The bill alleges:

"That the said company is and has been during said times the owner of valuable water, water rights, reservoirs and an entire water system, *for furnishing water to consumers*, for domestic, irrigation and other purposes, for which water is needed for consumption, and of a franchise for the impounding, sale, disposition and distribution of the waters owned and stored by it, to the defendants and other consumers, and to the city of National City and its inhabitants."

Bill of complaint p. 2.

And again:

"That by the expenditure of said large sum, said company has procured and owns *subject to the public use and the regulation thereof by law*, water, water rights, a reservoir site and reservoirs * * * and has constructed and laid therefrom its water mains necessary to supply the defendants and their lands hereinafter mentioned, and the said city of National City and its inhabitants, with water and has constructed and put in mains, pipes and all other things necessary to connect said water supply with the premises and buildings of the defendants, and each of them, and with the premises and buildings of said city and its inhabitants, and to furnish them, and each of them, with water, and was at the times hereinafter mentioned furnishing them and each of them with water."

Bill of complaint p. 5.

It can hardly be contended that the bill does not show an appropriation of water for sale, rental and distribution.

But the answer of the defendants is even more explicit in this respect. It alleges as follows:

"They deny that said corporation is, or at any time was, the owner of the water or water rights, as alleged in the complaint, *otherwise than as the appropriator, under the constitution and statutes*

of the state of California, and the acts of congress, of the water of the natural stream in the said county of San Diego known as the Sweewater River. *And they aver that the purposes of such appropriation were for sale, rental and distribution to the public.*"

Ans. page 3, line 27.

Notwithstanding this plain and explicit denial that the company owns any water, or water rights except as an appropriator for the public use and the equally explicit affirmative averment that the purpose of the appropriation was for sale, rental and distribution to the public in the exact language of the constitution and statute, their whole argument in support of this answer is founded upon their unwarranted assumption, in the face of their sworn answer, that the company *was* and *is* the owner of the water and water rights free from any obligation to the public and, as such owner, was authorized to, and did, contract the same to them, and that the company is in no way affected by either the constitution or the statute.

And upon what ground do they repudiate their own averments as to the nature of the corporation and its interest in the water. Solely on the ground that the company owned a large portion of the lands covered by and to be benefited by the system and the development of the water. But what difference this can make, as to the rights, duties and liabilities of the company, in appropriating and disposing of the water to the public, has not yet been explained. Once in the history of the state a corporation, situated precisely like this one, attempted to take this same ground but the Supreme Court held, unqualifiedly, that the fact that it was partly organized as a land

company and owned lands under its system, did not affect its obligations to the public, as an appropriator of water on the ground that by its incorporation as a water company it had impressed upon it a public trust —the duty of furnishing water to the public.

Price *v.* Riverside Land and Irrigating Company, 56 Cal. 431.

And this court has, in a very late case, held this same corporation amendable to the provisions of the constitution, and bound by an ordinance of the city of National City fixing water rates.

San Diego Land and Town Company *v.* National City, Fed. Rep, May 2, 1896.

Counsel rely upon McFadden *v.* Board of Supervisors, 74 Cal. 571. But that was a case where a corporation appropriated the water for the use of its own stockholders, only, and not for sale, rental or distribution to others. And it was for that very reason, and that only, that it was held not to be within the constitutional and statutory provisions for fixing rates. Not only is it expressly averred, both in the bill and answer in this case, that this company was organized for the sale, rental and distribution of water to others, but its articles of incorporation, as set forth in the answer provides that the purpose of its organization, in part was "the supply of water to the public," and the answer of the defendants shows conclusively that they have been buying water from the company, and paying an annual rental therefor, ever since the company commenced to do business. It seems idle, under such circumstances, and such is-

sues, to discuss the question whether this company was and is a corporation furnishing water subject to the provisions and restraints of the constitution and statutes or not, and if it is such a corporation what becomes of the elaborate and learned brief of the solicitors for the defendants. The foundation upon which their whole argument rests has crumbled away and the argument itself comes to naught. But they claim that they have purchased and paid for the "servitude"—the "water right" and therefore "the element of net revenue is for all time eliminated from the rates." That is to say: "When a party purchases a water right, or even where the water is voluntarily made appurtenant to his land by applying the same thereto, without compensation, he is for all time entitled to the water without paying the company a single dollar therefor." If there is to be no "net revenue" the company must, necessarily, receive nothing. If only enough is paid to cover actual operating expenses, and maintenance, as they claim, the company necessarily receives nothing for furnishing the water, and the necessary decay of its plant, each year, is a net loss. It is alleged in the bill, and not denied in the answer, that the distributing system of the company is perishable and requires to be replaced once in sixteen years. If so it must, under counsel's construction of the law, receive no compensation for the water it furnishes but must lose its entire distributing system within sixteen years. Certainly a court of equity must be driven to such a construction before adopting it.

But this leads us to inquire what is the water right that a party gets by purchase, or otherwise, under the laws of this state. It seems to us that the whole question is answered by section 552 of the Civil Code of this State which provides:

"Whenever any corporation, organized under the laws of this State, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, *at such rates and terms as may be established by said corporation in pursuance of law.* And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation."

The section defines a water right, such as the defendants claim to have acquired. It is the right to the perpetual easment of the flow of the water "at such rates and terms as may be established by said corporation, in pursuance of law." It protects the land owner from the injury of having the water supply cut off from his lands, after the same has been planted, or improved, as a result of acquiring the use of the water. It secures the use of the water to him, upon the payment of the rates established as prescribed by law, as against subsequent sales beyond the capacity of the system, and he may enjoin the corporation from disposing of and attempting to furnish water to others beyond such capacity, and thereby imperiling his right to the perpetual flow of the water to which he has become entitled. It secures the owner of the water right against having his water supply cut off or diminished. Such a right is justly regarded as

a valuable one. It has been the subject of purchase and sale ever since water has been furnished by one person or corporation, to others. The right of corporations, or other water companies, to sell this right has been recognized and enforced by the Supreme Court of the state.

Fresno Canal Co. *v* Rowell, 80 Cal. 114.

Fresno Canal Co. *v.* Dunbar, 80 Cal 530.

Until the late decision of this court in San Diego Land and Town Company *v.* National City, the existence of such a right, and the power of water companies to sell and dispose of it, was never questioned. The statute of the State expressly provides for it, and protects the owner of the right in its continued enjoyment. Both the companies and their consumers have always regarded it as a tangible and valuable property right. We cannot believe that the conclusion reached in the case last cited will be adhered to, even by this court, on more mature and careful consideration of the subject. But in this case the question of the existence of such a right is not involved. Both parties maintain that there is such a right and that it has been sold by the company and purchased by the defendants. The sole question here is: *Does the purchase, or acquisition of this right, affect the right of the company to collect an annual rate for the water supplied through and by its system, and, if so, how and to what extent?* The defendants maintain that by acquiring the water right, by reason of the purchase of their land from the company, by having the water placed upon the lands, free of charge, or by purchasing the water

right, they have thus acquired the right to have the water furnished to them, forever, without any compensation whatever to the company for its services and the use of its plant in storing and delivering it. Concealed under the ambiguity of their way of putting it, they are no longer bound to pay rates "on the basis of net revenue." Now what is the result? Every consumer who receives water from the company, upon his lands, becomes entitled, by the mere act of putting the water upon the land, to this water right. It makes no difference whether he pays for the right or not. It makes no difference whether he purchased the land from the company or not. If the company voluntarily places the water upon his lands, by that act alone, he becomes, by virtue of Section 552, the owner of the perpetual easement of the flow of the water. The section referred to places the consumer who purchases his land from the company, and the consumer who does not, but has the water placed upon his land, purchased from another, on precisely the same footing. It is merely a protection against having the water once supplied cut off from his lands. And in both cases, by virtue of the express provisions of the statute, he is only entitled to the "flow and use" of the water "*at such rates and terms as may be established by said corporation in pursuance of law.*" The acquisition of this perpetual right to the flow of the water not only does not relieve him from paying for the water he receives, but the statute, in express and unequivocal terms, while protecting him in the right, provides

as a condition thereof that he must pay such rates for the water as the company may fix.

So we have the law before the adoption of the present constitution, and the enactment of the statute of 1885. It is so plain that all who read may understand. There is no excuse for misunderstanding the code provision, or the right secured by it, both to the consumer and the company. It protects the former in the perpetual flow of the water, and the latter in its right to payment for the water it furnishes. This brings us to the question discussed by counsel:

What effect has article XIV of the constitution, and the statute of 1885 upon the respective rights and duties of the parties.

We maintain that, so far as any question in this suit is concerned, they have no effect whatever except to authorize the fixing of the rates to be charged for the water by some one else besides the company. The right to the water flowing in the natural streams of the state was as much a public use before the constitution was adopted as it is now. So much of the constitution as declares it to be so is a mere constitutional declaration of a rule of law, and a right, already existing. It is so declared as a basis for what follows. What follows are the provisions for fixing the rates to be charged for water furnished. As to water furnished ouside of cities and towns the constitution does not provide, specifically, how the rates shall be fixed, but provides that the "right to collect rates or compensation for the use of water is a franchise and can-

not be exercised *except by authority of and in the manner prescribed by law.*"

Hence the statute of 1885, prescribing the manner in which this franchise of collecting rates shall be exercised and such rates fixed. It is not claimed by the defendants, as we understand them, that section 552 of the Civil Code has been abrogated or repealed by the constitution, or by the statute of 1885. If not, then the water right, or the right to the perpetual flow of the water, when once attached to the land still exists by virtue of that section. Then what effect has the constitution, and later statute, upon this water right, and the terms upon which the use of the water under it may be secured. We answer none whatever, except to *change the manner* in which the annual rates to be charged may be fixed at the option of the consumer As the section of the code stood he was only entitled to the water upon paying the rates, and upon the terms *fixed by the company.* The constitution made the right to collect the rates a franchise and provided that it should only be exercised by authority of and as prescribed by law. It was already authorized by section 552, but no mode of establishing the rates, except by and at the will of the company furnishing the water, was prescribed. By the statute of 1885 the law is so changed that if a certain number of consumers or other citizens are dissatisfied with the rate they are required to pay, under section 552, in order to preserve their right to the perpetual use of the water, they may apply to the board of supervisors and have such board establish and fix the rates. But the stat-

ute went farther, and, in substance and effect, declared that the rates should be so fixed as to return to the company, as *net annual profits, not less than six nor more than eighteen per cent.*, upon the value of its plant and property used in furnishing the water.

Stat. 1885, Sec. 5, p. 96.

But as we have before said unless the consumers see fit to call upon the board of supervisors to fix the rates the right to fix them is still preserved to the company, as under section 552. In other words the consumers *may* resort to their remedy provided by the statute of 1885, or not, as they may see fit. If they do not the company may establish its own rates, whether the rates, so fixed by the company are subject to review, or alteration by the courts, need not be considered in this connection. We are now replying to what is said on the other side as to the effect of the constitution, and the statute of 1885. The question as to the manner of acquiring the water right provided by section 552 is wholly immaterial with respect to the right to collect an annual rate, or the amount to be collected. No law can be found, anywhere, to maintain the contention of counsel that it can have any such effect. All the law on the subject, including section 552, makes the continued right to the use of the water, no matter how the right is obtained, conditional upon the payment of the rates. When the statute of 1885 was enacted the law required the payment of these rates. If it had been intended that any distinction as to the amount to be paid, should be

made, between a consumer who purchased his land from the company, and one who did not, or between one who purchased a water right and one who did not, doubtless such a distinction would have been provided for, but it was not. We submit that, under this state of the law, there is no warrant for the contention of counsel that the defendants should contribute nothing to the company as a profit, or remuneration for its services, and the use of its plant, in furnishing the water. There is nothing in the constitution, the statute, or any adjudicated case, that gives any, the slightest, support to such a doctrine. Not only so but the statute now in force expressly provides that the rates shall be so fixed as to return a net profit of not less than six per cent on the value of the plant.

Besides, it is the undoubted policy of the law that the rates shall be uniform. This cannot be so if one rate is made for the consumer who purchases his land from the company, another for one who purchases a water right for land not obtained from the company, and still another for one who acquired his water right, without compensation, and by reason of the fact that the company has vested the water right in him by voluntarily attaching the water to his land. All three of these classes are represented as defendants in this suit. In the beginning it was supposed that there would be ample water for all the land under the system and no thought of a preferred right, by purchase or otherwise, was thought of. Those who bought land of the company entertained no idea that they were paying for the water, for the reason that their neigh-

bors, who did not buy from the company, were then getting water on their lands without paying a dollar for it. It was only after it became apparent that the supply of water was not sufficient for all, that the preferred right to it was sold as a water right. The idea that the high price paid for the land bought from the company, would, in any way, affect the annual rate to be paid for the water was an afterthought conceived by the imagination of the ingenious gentleman who wrote the brief in this case. And his method of proving it is most remarkable. If the law relating to the supply and use of water can be anything like as complicated and abstruse as his argument indicates, courts and lawyers may as well suspend all efforts to administer the law and adjust the rights of parties under it. But to any one who makes an honest and fair effort to arrive at the object and intention of the law on the subject, it will appear to be exceedingly simple and free from complications. It is just such efforts as that of the learned solicitor for the defendants that confuses the subject and renders it complicated and uncertain.

As to the claim of the defendants that they have, by five years user of the water, obtained, by prescription, the right to the use of the water *at $3.50 an acre per annum* it is too absurd, it seems to us, to need any refutation. They did not need to use the water for five years in order to acquire the right to its perpetual flow. The mere voluntary application of the water to the land of a consumer gave him this right. But the claim that, because the company has, for five years,

furnished him water at a loss, it must continue to do so forever, is a little too much. In fact this whole argument about "easements," "servitudes," "serviant estates," "statute of uses," "dominant estates," etc., etc., if it did not come from a lawyer of good reputation, would be looked upon as a burlesque, so unreasonable does it appear.

VII.

It seems to be the policy of counsel to belittle and narrow the rights of private consumers, in the waters of the State, and to magnify the rights of the company. Therefore they contend that we are wrong in our statement that the company is the mere agent for furnishing the water to the public to which it belongs, and, as it is wholly immaterial in this case, whether we are right or not, in this respect, we submit and let them have their way. But with the utmost inconsistency they abandon this position and argue, at length, that the company is not the appropriator of water at all because the appropriation of water under our law means the actual application of it to a beneficial use, and that this application is made by the consumer, therefore the consumer and not the company is the appropriator of the water. This seems to be logical, and for the purposes of this case, we will modify our position to the extent of saying that the company has *filed upon* the waters of the stream, constructed its dam, stored the water, constructed its distributing system, and provided all the means necessary to carry and supply the water; and the defendants have *appropriated* the same by letting the company run it on-

to their land. There is no occasion for entering into a long discussion over nonessentials like this. It can make no kind of difference *who* actually *appropriated* the water. It has been appropriated, which is quite enough for our purpose. The sole question here is how much is the company entitled to for supplying the water, no matter how appropriated, upon the lands of the defendants, and nothing can be gained by wandering from the subject and discussing pure abstractions.

But they contend further that the company never had any water right, and therefore could not sell any. This is a singular position for counsel to take as they base their whole argument upon the theory that they have bought something we did not own, and could not sell. If we never had any water right, and could not sell any, how could they acquire any rights by buying something that never existed. If they *appropriated* the water themselves, by letting the company put it on their lands, and the company never had any rights therein, by what right can they ask us to carry the water to them, through our system, built with our money, for nothing. Truly these gentlemen need to be protected from their own reasoning. It is the old story of a lawyer acting as his own attorney.

But we must question the accuracy of counsel's statement of facts. They assert that "both the carrier and the consumers in this case have thus far regulated their relations entirely by contract." Nothing could be farther from the truth, in respect of the matter of annual rates. No contracts respecting the amount of

such rates were ever made. The company itself fixed a uniform rate for all consumers, as it had a right, under the law, to do, and every consumer was required to pay it. There was no contract as to such rates.

The only thing that resembled a contract was the application of the consumer for the water, in which he set out the uses for which he desired the water, and the rate established by the company was set opposite each item called for. The consumers had nothing whatever to do with the fixing of the rate. Nor is it true, as counsel states, that "they have dealt with the subject in the way of their race, treating the whole matter as of private and not state initiation". The company has never, at any time so treated the subject, nor do we believe a single consumer, not even the solicitor who wrote this brief, ever thought of treating it as a matter of private contract, or control, until he found it expedient to take that position in this case. It is a position now taken for the first time in all of the controversies between the company and its consumers. But if the statements were true their attitude respecting their rights and duties could not alter the law.

It is equally untrue that, "all at once the 'carrier' cooly ignores all contracts it has entered into and all grants it has made, repudiates all rights that have vested." It has violated no contract, because it never made any, with respect to the rates it should charge. No such contract is alleged in the answer nor was any such ever made. It has not, nor does it now, repu-

diate any of the vested rights of the defendants. These assertions are wholly without foundation and could only be made with a view of prejudicing the mind of the court. The company accords to the defendants all of the rights they have in the water and has never questioned them, and its conduct in its dealings with the defendants will compare most favorably with theirs. It is simply trying in a legal way, to get such a rate for furnishing water to consumers as will save it from ruin. They, on the other hand, not denying that the rate it has established is a reasonable one, are endeavoring to take advantage of mere representations made by the company when it first commenced business as to the price at which it could furnish water.

These gentlemen are greatly addicted to splitting hairs. We said, in our opening points, that the company was the agent of the *public* in furnishing the water. They assert that it is not the agent of the *public* but of the *consumer*.

Well, we supposed that within the meaning of the law, the consumers were the public. But we must have overlooked the importance of the distinction between *a* consumer and consumers in the aggregate, or the public, for counsel assert very gravely that "*this changes the whole face of the thing.*"

We can answer with perfect frankness the inquiry of counsel, "what has become of the *water rights* which the bill avers are *owned* by the respective defendants?" So far as we have any knowledge on the subject the respective defendants still own them. They may have

parte l with them since this suit was brought, but, if so, we have not been notified of the fact. As to the further inquiry: "What element in, or constituent of, the water rights, does the bill allege to have been acquired by the defendants, by purchase or otherwise, from the company." We must refer counsel, and the court, to the earlier pages of this brief. We have there explained our idea of the right to the perpetual use of the water, as provided for by section 552 of the Civil Code. It is simple enough and ought to be easily understood. It is not "moonshine" and so far as we know, until the brief of counsel was written, it was not suspected that there was any "huge delusion" on the part of the defendants with reference to it. If the defendants were now asked to surrender the perpetual right the section referred to gives them, and what is denominated a "water right," we apprehend they would treat it as anything but moonshine. It is justly regarded by all of them as a most valuable right, without which their lands would be of little value. But counsel's idea of a water right is peculiar. They say:

> "We venture to believe the more rational explanation is that the company was selling, and, if you please, giving away *servitudes upon its works* and that this element of the water right is the precise thing of which defendants have, by purchase or otherwise, become the owners through their dealings with the company; *the use of the water they get under the constitution and the laws, on their own merits, by using it, and not from the company.*"

They have labored to show, in the earlier pages of their brief, not that they have purchased, or otherwise acquired, a water right such as we have attempted to describe, and such as the code guarantees to the con-

sumer, but that they have in some mysterous way *become the owners of a part of the reservoirs, distributing system and other property* of the company. We have not been able to extract from the mass of verbiage and fine spun theories, contained in their brief, just what their claim of ownership is. But their interest in our plant is easily understood. It is the simple right to the perpetual flow of the water through our pipes, coupled with the obligation on our part to keep the system in such condition and repair as may be necessary to supply the water. You may call it an easement, as it is called in section 552, or whatnot. There is nothing in a name. That is the right, plain and simple. But it makes no kind of difference, in this case, what it is. It is a right that is conditioned upon paying an annual rental, or rates, for the water furnished, or if it pleases counsel better, for the services of the company and the use and the wear and tear of its plant in supplying the water. And this rate, we remind counsel once more, is the sole and only thing in controversy in this case. Therefore all of their fine spun theories may be important in an educational way, but the question as to the exact nature of the rights of the defendants, and the corresponding duties of the company, are wholly immaterial and confuse rather than aid in arriving at an intelligent and just conclusion upon the real and only question presented by the issues.

For the reason just suggested we regret the necessity of following counsel in their long and wearysome discussion of what they understand by a "public

use" and their analysis of the decided cases in Colorado as to the rights of the public generally and of individual consumers in particular. It does seem to us to be superflous and a pure waste of time so far as this suit is concerned. Indeed, if we should concede the correctness of the cases relied upon, from another State, and under a different constitution, and every deduction of counsel therefrom, we are totally unable to understand how it could affect this suit. Their claim that they have an easement in ~~that~~ the perpetual flow of the water through our system is not a controverted question in the case. Our only claim is that for our services and the use of our plant in bringing the water to, and delivering it upon their lands they should pay us a reasonable compensation. They concede they should pay us enough to cover the operating expenses, while we say they should pay us the operating expenses and something additional as compensation for storing, carrying, and delivering the water, and to make good the wear and tear of the plant. This seems a very simple question, not depending upon the particular *nature* of their rights in the water, or in the system, nor of the obligation of the company to them.

But we recognize the fact that the court may take a different view of the questions involved, and for that reason, and that only, we feel it necessary to enter upon the discussion, to which we have been invited by counsel. The Colorado authorities, relied upon, certainly sustain their position that the company is not the "proprietor of the water diverted," if it be con-

ceded that this is a *quasi* public corporation engaged in the sale, rental and distribution of water, and therefore dealing in the "public use" mentioned in the constitution, but strangely enough the very fact that it is such a corporation, is the one they are strongly combatting. It is upon the very ground, assumed by them, no doubt erroneously, that this a *private* corporation dealing with its own private property, about which it has the power to contract, and has actually contracted with the defendants, that they rely most strongly. It is upon this ground that they strenuously maintain that neither the corporation nor the board of supervisors have any power, under the constitution or statutes, to fix the rates to be charged by the company. Why they have adopted this line of authorities, considering their own proposition, is beyond our comprehension. But conceding the effect of their authorities what do they establish and how do they become material to this controversy. They simply hold, so far as they affect the question of rates, that the rates to be paid are not *for the water* which already belongs to the consumer as one of the public, but as *compensation for transporting the water.*

See quotation from Wheeler *v.* Irrigation Co., 17 Pac. Rep. 487, their brief p. 33.

Very well this is entirely satisfactory to us. If they pay us the rates to which we are entitled, in any view that may be taken of it, they may charge it up to transportation or any other account they may think proper. Only let them pay us just rates and we will not quarrel with them about the non-esential question

whether they are paying us for *our* water or for *transporting their* water.

But they go further and maintain that it is not the act of diversion on the part of the company that constitutes an appropriation of the water, but the actual application of it to a beneficial use, in this case, the application of it to the lands of the consumers. It may be conceded that the appropriation is not *complete* until the water is so applied. But each successive act necessary to bring the water onto the land, and thus apply it to a beneficial use, is a part of the act of appropriation, including the filing upon the stream, construction of the dam, and storage of the water, and the construction of the pipe or pipes necessary to conduct it to the land, all of which is necessary to the culminating, or final act of applying the water to the land. And all of this absolutely necessary work is done by the company, and at its expense. And for all this it should be paid a reasonable compensation, and it is so provided by law. But, not because it is material here, but for the sake of accuracy, and that we may not be led into a false position, we do not admit that the position taken by counsel that *as between individual consumers* taking water from a company like this, there is any priority of right, is correct. The latest case in Colorado, directly on the point, is to the contrary.

Wyatt *v.* Larrimer &c., Ir. Co., 29 Pac. Rep. 906.

This was a case decided by the court of appeals. On appeal to the Supreme Court, in the same case, it was reversed on the ground that the court of appeals

had held that the water company owned a proprietary interest in the water. But as to the priority of rights as between consumers taking from the company, no ruling was made on the appeal. The true doctrine we think is that *every* consumer, no matter when he acquires his water right, may protect such right by preventing the company from selling, or attempting to sell or deliver water, beyond its capacity, and thereby cutting off any of the supply of water to which he is entitled.

Wyatt *v.* Larrimer &c., Ir. Co., 33 Pac. Rep. 144.

But until this water right is thus invaded he has no ground of complaint, and each and all of the consumers are alike affected by such oversale.

What counsel is pleased to call the "spurious view" of the "public use," under the constitution, to the effect that a corporation may continue to sell water indefinitely, and beyond its capacity to furnish what water is needed for all its consumers, and thus compel them to prorate and divide up an insufficient supply, is a view suggested by counsel alone. No such claim has ever been mentioned or even thought of by us. Nor do we contend that the consumer has not a fixed interest in the water works to the extent that he may compel the company to keep it in repair and use it to supply him the water to which he is entitled *provided he pays the reasonable rates therefor as fixed pursuant to law.* It is this proviso that counsel are attempting to escape. And if they had kindly confined

themselves to the matter in controversy much labor and confusion might have been avoided.

So we agree with counsel that the defendants each have a right to the water, or a water right, which may be sold with the land, and, so long as they, or their assigns, or grantees, pay their water rates they are entitled to receive it through the company's system. We do not admit, however, that this gives them any property interest in the plant itself. Their sole right is to have the water carried through the plant by the company, its owner. So far and no farther have they any interest in the plant itself. We have, for the purpose of this argument admitted that the company has no proprietary interest in the water, but it does own the plant constructed with its own money, and the defendants have no proprietary interest in such plant.

It will be noticed that in the Colorado decisions, which counsel fully adopt, it is held that the corporation furnishing water is both an "intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional rights, as well as *a private enterprise prosecuted for the benefit of its owners.*"

See their Brief p. 38.

But counsel wholly overlook the latter capacity in which the company acts. They seem to look upon it as a purely charitable organization, operated for the sole benefit of the consumers, and not entitled to any "net profits."

VIII.

We are pleased that counsel should admit, albeit the admission comes too late to save unnecessary labor, that they have at "perhaps undue length" cited decisions to show "what opposing counsel seem to admit." They take it that they have proved that the company "has no title to the water diverted, has no water to sell." They say:

> "It follows, with unerring certainty, that if the carrier may make a contract of sale, or rental, with the consumer at all, the subject of such contract is not the water, and must therefore be some interest in the water works."

There is some question as to the "unerring certainty" of this proposition, but it is certain enough for present purposes. But the material question is, *what* interest the consumer obtains in the property. We think, laying aside the matter of "easements" "servitudes," and the like, which only tend to make this unerring certainty uncertain, the interest of the land owner in the plant is easily enough understood. As we have said before it is the right to have the water, for which he has secured the perpetual right, flow through the company's system and to have the plant maintained, and operated, for that purpose. The perpetual right to this water he has paid for, if he got it by purchase, or has obtained without consideration, if it has been voluntarily annexed to his land. But for the services of the company in storing, carrying and delivering the water, and the expense of operating the plant he must *pay the rates fixed as prescribed by law.* There has been no contract relating to the rates necessary to pay for this service nor has it been paid for. There

can be no pretense of anything of the kind. They beg the question and attempt to cover up the real question at issue here by maintaining that when they paid for the *water right* they obtained what they did not pay for, the services of the company and its plant in storing, carrying and distributing the water. The perpetual right to the flow of the water is regarded as so important, as we have seen, that it is preserved to the land owner by positive law, but on the condition that he pays the rates fixed by the company for furnishing the water. The difference between the two is so clear that we wonder they should be confused or mistaken one for the other. It is wholly unnecssary to inquire, in this case, whether a contract for a fixed annual rental would be legal or not, for the reason that no such contract is set up in the answer, nor has any such contract ever been made. The only *contracts* alleged are to pay the rates fixed pursuant to law and the like. There are only a very few of the defendants who have contracted for a water right. Nearly all of them have obtained the water right provided by section 552, and by operation of that section, which, as we have shown is the right to the perpetual flow of the water at the rates and on the terms fixed by the company. The sole ground upon which they can claim that the rates cannot be changed by the company is that it represented that the water would be furnished at $3.50 an acre per annum. This shows conclusively that they understood that they must *pay* for the water as it was furnished to them. And there is no element of estoppel in the transaction. All of

the parties concerned must have known, as a matter of law, that any such representations could not be binding, as the law explicitly provides how these rates may be fixed and it is not by contract. And no contract fixing them permanently, much less any representation that they would be maintained, permanently, at a given figure, could be legally binding.

We are ready to concede that the water right, or the right to have the perpetual flow of the water attached to the land, is a matter of contract, and that a contract made by the company therefor, or the putting of the water on the land, would be binding on the company. Counsel call it a "freehold servitude," but whatever it is, it is always subject to the payment of the annual rates as prescribed by law, and cannot affect those rates in the least. The Wyatt case, relied upon by counsel involved only the question whether consumers who had bought water rights could enjoin the company from selling water, beyond its capacity to supply, to other persons. The court held they had such right, and of the correctness of the decision we have no doubt. But the case has no bearing whatever in this case except to confirm what we maintain that the water right is a separate and distinct thing from the services of the company in storing, carrying and delivering the water, and that it was the water right, and that alone, that the defendants acquired, and that in order to have the water carried for them and delivered on their lands they must pay for such services, and the use and wear and tear of the plant. Such is the law under Section

552, and such was the law before the enactment of the codes.

Stat. 1862, p. 541, Sec. 3.

There has never been a time under our law, when corporations dealing in water were not regarded as organizations operated for the profit of their stockholders and entitled to such rates as would secure them such profit.

It has never been claimed by us that the regulation of the rates by the board of supervisors is inconsistent with the acquisition of the easement, so called, appurtenant to the land. On the contrary we agree with counsel, fully, that they are separate and distinct things, but that the enjoyment of the easement is dependent upon the payment, by the land owner, of the rates fixed as prescribed by law.

IX.

It is an unwarranted assumption on the part of counsel that, at the oral argument, we seized upon the decision of this court, in the National City case, to the effect that there is no such thing as a water right, as a judicial sanction for the repudiation, by the company, of its contracts. We say frankly that we do not agree with the conclusions reached in that case. We simply remarked that the court had held in the case referred to that there was no such thing as a water right, and that we would leave it to counsel on the other side to convince the court that it was wrong, because, if there was no such thing as a water right, the defendants could claim no advantage growing out of the purchase of a thing that had no exist-

ence. We maintain, as we have done heretofore, that there is such a thing as a water right, that the Land and Town Company has, in some cases by contract, and in some cases by operation of law, granted such water rights to the defendants, and that they now own them. If this be what counsel means by repudiation of a contract, under judicial sanction, or otherwise, then the company has repudiated its contracts. We maintain further, and in harmony with the position of counsel that this water right,or the right to the perpetual flow of the water, conditioned on the payment of reasonable rates, is a valuable property and that to compel a company without compensation to put water on ones land, thus vesting him with this water right, by operation of section 552, is confiscation plain and simple and of the rankest kind. This is our position that need not be misunderstood. If it is not a thing of value then it is not confiscation for any one to appropriate it, either with or without judicial sanction. But however this court may look upon it counsel cannot consistently disagree with us for they maintain the existence and value of the right as strongly as we do and they, being defendants as well as solicitors in this case, know its value. With them it is not a matter of speculation We need not repeat what we understand this water right to be. Counsel profess not to understand what is meant by a water right. Section 552 of the Civil Code will inform them if they will only read it. They attempt now to maintain that because they have secured a water right, in most cases

for nothing, they are forever freed from paying the company anything for storing, carrying and delivering the water on their land, or for the wear and tear of the plant consequent upon its use for their benefit. No sham assumption of indignation at the claim made by the company can conceal the injustice or absurdity of such a proposition. Their claim is that their acquisition of this water right, in most cases for nothing, should be construed as being "grants of freehold servitudes on the system for price paid," and that the bearing of this upon the 'annual water rates allowed by law' is that it eliminates from them the whole element of net revenue." In plain terms because they acquired the right to the perpetual flow of the water, through the company's system, in case of most of the defendants *for nothing* the company must, for that sole reason, store, carry, and deliver the water for all time and wear out its plant in their service *for nothing*. The proposition is so utterly unjust as to shock any one possessed of common honesty and fairness. There are, in round numbers, 700 acres of land that was purchased from the company, and the water right acquired in that way, by operation of section 552. Something over 900 acres were owned by other parties, and for these the water right was acquired by operation of the same section by the water having been put upon the lands voluntarily and without compensation, by the company. Those who purchased from the company did not, in fact, pay a dollar more for the land because it could supply the water. They would have been compelled to pay ex-

actly the same price if they had purchased land under the system from any other owner. All lands in the neighborhood, whether owned by the company or not, sold for the same price. No one who bought from the company understood that they were paying a dollar for a water right. They paid for the land at exhorbitant prices, in boom times, and expected that when they wanted it they could get the water at the annual rates by merely connecting their service pipes with the mains of the company. Their pretension now that they ever bought any interest in the plant of the company, or ever understood any such thing, is the purest kind of hypocricy invented for the occasion.

Counsel refers, frequently, to contracts and their construction. No contracts, such as they assume were made, are alleged in the answer, nor do we know of any such. The only contracts alleged in the answer are those referred to in our point II, made in the opening, and copied above. They expressly bind the consumers making them to pay the annual rates. With respect to those defendants who bought their lands from the company, and those who secured their rights by having the water put upon their lands, have made no contracts with the company, and none are alleged. They simply got their water by operation of section 552 and on the condition that they pay the rates fixed by the company pursuant to law. If they claim the water right by virtue of that section, and they have no other claim to it, they must take it with the annexed condition But their claim amounts to this: That the consumers by securing the water

rights, no matter how, become thereby *the owners* of so much of the *plant* as well as of the water, and that they, as owners, are only bound to pay for operating and maintaining it. But the trouble with this position is that they hold the company bound to operate the plant which they own, be responsible for the delivery of the water, and all failures to deliver it, put in a new system when this one wears out, and in every way act as if it were the owner of the plant, and that it must do all this without any "net revenue," or to speak more plainly, without any profit or compensation to its stockholders who are not only the owners of the stock but personally responsible for all its debts and liabilities. To such absurdities does counsels argument lead them.

X.

The construction attempted to be placed upon the statute of 1885 is as novel as the balance of their brief. Their whole argument in this case certainly has the merit of being new and original. They say, with reference to this statute, that its provision, to the effect that until the rates are fixed by the board of supervisors, the rates established and collected by the company shall prevail, presupposes, and proceeds upon the theory, that the rates have been *fixed by contract* between the company and the consumers, and that the intention of this particular provision is to confirm and make perpetual the rate so agreed upon, until the board of supervisors fix the rate. That is to say that, as the company cannot apply to the board, it shall always be bound by the contract rate, but that the consumer is only bound until he sees a chance to get

the board of supervisors to help him violate his contract by establishing a lower rate. This is certainly a delectable piece of legislation, so construed, and if counsel are right that this matter of rates is a matter of private contract, the statute might be amenable to the constitutional objection that it interferes with vested rights. It may be, however, that the learned solicitors are proceeding upon the theory that a water company has no rights, because they have all been vested in the consumers as "freehold servitudes." It would seem so.

But this additional theory that the statute of 1885 presupposes a contract fixing the rates, is not only imaginary, but the contrary is susceptible of exact demonstration. The earliest statute on the subject gave water companies power "*to establish, collect, and receive rates, water rents, or tolls,*" but "subject to regulation by the board of supervisors of the county in which the work is situated, *but which shall not be reduced by the supervisors so low as to yield to the stockholders less than one and one-half per cent. per month upon the capital actually invested,*

Stat. 1862, p. 540.

There is no intimation in this statute that the rates or rentals may be fixed by contract.

Following this was section 552, of the Civil Code, which provides that the consumer shall receive the water "*at such rates and terms as may be established by said corporation in pursuance of law.*"

This code provision certainly did not contemplate or authorize the fixing of rates by contract. Probably

this section of the code left the statute of 1862 intact and, in order to establish the rates "in pursuance of law," as provided in the section, the company might fix its rates, as provided in the statute, subject to the action of the board of supervisors. But that is not material. So far we have nothing tending to show the legislative intent to leave the fixing of the rates to contract. But if any such deduction could be made from the statute of 1862 and the section of the code, which is impossible, the question has been forever set at rest by the constitution. The constitution provides that *the right to collect rates * * is a franchise* and cannot be exercised except *by authority of, and in the manner prescribed by law.*"

This, it must be understood, does not apply to the franchise to be a corporation, but *to the right to collect rates.* And it is further provided that this right to collect rates cannot be exercised except by authority of and in the manner *prescribed by law.* Up to the time the constitution was adopted the company was authorized to fix its own rates, subject to the supervision of the board of supervisors. The constitution takes the matter of fixing rates out of the domain of contractual obligations and makes it *a franchise* to be controlled by the state. It seems to us nothing could be clearer than this. But we need not stop here. The statute of 1885 does *prescribe the manner* in which rates shall be fixed and collected. When the statute was enacted, the rates were authorized to be fixed *by the corporation* and not by contract. But the corporation, in fixing the rates, was made subject to the

action of the board of supervisors. However, there was no provision in the statute of 1862, nor in the section of the code, as to the manner of submitting the question to the board of supervisors. This is remedied by the statute of 1885, which establishes the procedure by petition of citizens and notice. With this exception, and the further exception that the amount of eighteen per cent., allowed under the statute of 1862, where the rates were fixed by the board of supervisors, was reduced to not less than six nor more than eighteen per cent., the law is unchanged. In all other respects the statute of 1885 is practically the same as that of 1862.

There has never been a time in the history of this state when this matter of rates for water was regarded as one to be controlled by private contract. The very nature of the rights of the parties interested in the water, and their relations to each other, and to the company supplying the water forbid any such idea. All consumers under any given system are jointly and alike interested in the water and the maintaining and operating the plant. The rates necessary to do this must be uniform. Each consumer must, if the policy of the law is carried out, bear his due proportion of this burden. The company cannot without violating the law, and its duty, discriminate between consumers. It must follow, necessarily, that special or private contracts cannot be made by the company with individual consumers which involves the fixing of different rates with different parties as the company may be able to contract with them. This would destroy

the uniformity of the rates that is absolutely necessary in order to adjust the burden equally and fairly. This being so it is expressly provided in the statute of 1885 that when fixed by the board of supervisors the rates as to *each class* of uses, "*shall be equal and uniform.*"

Stat. 1885, p. 96 sec. 5.

It must be the same, of necessity, where the rates are established by the company.

But the language of the statute of 1885 itself excludes all idea that the rates may be fixed by contract. It provides that until the rates are fixed by the board of supervisors, "*the actual rates established and collected*" by the company shall be deemed and accepted as the "*legally established rates therefor.*" This unquestionably proceeds upon the theory that uniform rates must be legally established either by the act of the company, or by the board of supervisors, and necessarily that they cannot be fixed by contract. But in this case, as we have said, the rates have never, in fact, been made the subject of contract. The company has never thought of so fixing the rates. Neither have the consumers.

But counsel again bring us back to the subject of "freehold servitudes" and insists that because the statute of 1885 authorizes the fixing of *different* rates at which water may be *sold, rented* or distributed, as the case may be, the statute necessarily "recognizes and provides for fixing rates for *freehold and leasehold servitudes.*" It is sufficient answer to this to say that the statute expressly provides for the fixing of rates

at which *water* may be sold or rented, and not for the sale or rental of "freehold and leasehold servitudes." This is a species of property, as respects the furnishing of water, that has been invented by counsel for the occasion. The separate terms, sold, rented, or distributed, were used, probably, for the sole reason that the constitution provides that water appropriated for sale, rental or distribution shall be a public use. And no doubt the terms were used in the constitution to cover the same thing by differant terms. It may be taken as certain that none of the law makers, in either case, thought of freehold and leasehold servitudes.

Counsel say "we are concerned here with those permanent irrigating rights termed easements." But this is a mistake. Their permanent right to the easement of the flow of the water is admitted. The sole question here is as to the amount of annual rental they shall pay. It is this mistake of counsel that has carried them and us into these long discussions of matters that are wholly immaterial. The mistake they make and it is most apparent, is that they assume that by acquiring this permanent right to the flow of the water they become entitled to it *at a certain and fixed rental, or rate, that can never be changed.* There can be no pretense that they contracted for any such thing. They claim, that by acquiring the water right or "freehold servitude" it follows, as matter of law, that the annual rate can never be changed. This claim is not shown to have any foundation in law or reason. Certainly there is no provision of law which supports

such a claim. Is it founded in reason? We may properly take the history of this company as conclusive evidence of the injustice of any such doctrine. When the company constructed its system and when this $3.50 rate was established, it was supposed that one main pipe line would carry all of the water and supply consumers. It was subsequently found necessary to supplement this with another pipe line known as pipe line No. 2 at an expense to the company of $68,847.97. It was also found necessary to make additions to the other main pipe line, in order to give proper service, at a cost of $49,216.25. Other additions and improvements were made costing large sums of money. The total expenditures for these additions and improvements, amounted to $229,764. 66. These not only involved a large additional outlay in construction, but the enlargement of the plant necessarily increased the cost of operation and maintenance. Besides this, as the system grows older, the necessary expenditures for repairs will largely increase. But notwithstanding all this their position is that the rate must stand the same forever and that, no matter how much the company may lose by reason of the rate being too low, it can neither apply to the board of supervisors to fix the rate, nor fix it itself, to meet the new conditions, and additional expenditures. It seems to us that the proposition is so utterly unreasonable and unwarranted that to argue it is a waste of time. The position they take that we cannot enforce the new rate because it has not been *collected*, as well as established, is, if possible still mose unreasonable. Can it be that

the language of the statute, that the rate "established and collected" shall be the rate, can, by any course of reasoning, be brought to the absurdity of declaring that the company must actually *collect* the rate from consumers before it can be regarded as *established*, and that the only thing necessary on the part of a consumer, in order to prevent paying any rate at all, is to refuse to pay the rate so established. The company, as we have seen, cannot have the rate fixed by the board of supervisors. Therefore, if its right to fix its own rate depends upon its ability to collect it from the consumers, all the consumers have to do, to prevent the fixing of any rate whatever, is to refuse to pay the rate established by the company, and refrain from applying to the board of supervisors to fix the rate, and the company's hands are effectually tied. So, if the rate already in existence is so low that it will not pay operating expenses it may be prevented from establishing a new and reasonable rate in the same effectual way. It is to such absurdities that counsel have been driven by the exigencies of their case. They are selfish enough to want this company to furnish them water, for all time to come, at a continual loss, and in order to accomplish this they have labored to convince this court that it should so construe the law, and the rights of the parties in this suit, as to deprive the constitution of all its beneficial effects in the protection of consumers of water, and to establish the doctrine that a company like this may fix its water rates by *contract*.

the very thing it was intended by the constitution to prevent.

Counsel, in conclusion, profess to grow indignant over the idea that a corporation may change its rates at pleasure. No such claim has been made. The law has furnished the consumer with an ample remedy by application to the board of supervisors if it attemps to change them improperly. And if this court should be of the opinion that it may, in the first instance, set aside or refuse to allow a rate as unreasonable, then these defendants have their remedy in this court. And in any event they have their final remedy in the courts if the board of supervisors fix an unreasonable rate. In either event they can be amply protected. On the other hand, if their contention is upheld, the company is absolutely without any remedy. It cannot apply to the board of supervisors, and if they are right, it cannot make a new rate of its own.

But their apparent indignation at a pretended wrong is misplaced and insincere. They do not and cannot claim that the $7.00 rate is unreasonable. They have not so alleged in their answer except to the extent of alleging that it is not necessary to pay operating expenses. It is only on their theory that the company is not entitled to "net revenue" that they attempt to maintain, or allege, that the rate is unreasonable.

Their pretense that they are vexed by the demand that they must enter into a contract containing the matters set forth in the answer pp. 33-35 is equally insincere. This is merely a requirement that they

make application for the water in the usual form. And this is the same form that has been in use, and has been signed by these defendants, time and again. It is a little remarkable that they should object to it just now for the first time.

As to the question of the jurisdiction of the court they say:

"On the question of jurisdiction, in respect of the amount involved we merely cite Fishback v. Western Union Tel. Co., Supreme Court Mar. 2, 1896; *and we express the hope that the jurisdiction may be maintained*, for the community and company as well, need to have the questions raised in this case settled."

We agree with counsel that it is important that the questions involved here be settled without delay. But if they are sincere in their expressed wish we are surprised that they should have challenged the jurisdiction of the court in their answer. It was wholly unnecessary.

XI.

With respect to the separate brief of Mr. Chapman his first effort is to show that the San Diego Land and Town Company is not a public or *quasi* pubic corporation dealing with a public use, but a private one dealing in water of which it is the private owner. But this, as we have shown in answer to the brief of Haines and Ward, is a contention made directly in the face of the express allegations of their answer. Besides he in effect admits that the case of Price *v.* Riverside Company, 56 Cal. 431, has settled the question against them so far as it can be settled by the court of last resort in this state. But in order to turn that case to account, in his favor he insists that while,

as held in the case cited, a corporation cannot escape its duty, as a water company, by combining the business of a private land company with its powers as a water company, in its articles of incorporation, it is equally true "one in the exercise of the powers of a purely private corporation, which acquires land acquires water rights, annexes them to the land, and sells off the land with the waters flowing upon them, cannot escape the legal effect of its deed by calling attention to the fact that in some other of its capacities it is a public corporation."

This may be conceded. But what is the legal effect of such a deed? It is specifically declared by section 552 above cited.

"Whenever any corporation organized under the laws of this state furnishes water to irrigate lands *which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold at such rates and terms as may be established by said corporation in pursuance of law.*"

Such is the legal effect of the deed of the company as declared by statute and it is an effect that the company is in no way attempting to avoid.

But as matter of fact it is not true, as a rule or as to most of the defendants, that the company had annexed the water to the land before selling the land. There may be a few cases of sales of improved land where this was done, but in nearly all cases the water was annexed to the land, for the first time, after the defendants or their grantors had become the owners thereof and by them, application to the company having been made by them for the water in the usual way. And it is upon this very ground that the other

solicitors for the defendants insist that the appropriation of the water was made by the defendants, and not by the company, because they, the defendants, and not the company applied the water to a useful purpose which was necessary to constitute an appropriation. Besides it is not alleged in the answer, or pretended in the argument, that the water was appropriated for the use of the company, or its stockholders, alone, as was the case in the McFarland case. The water was appropriated for sale, rental, and distribution, according to the specific allegations of their answer, and according to the facts, and not for private use. And as evidence of this fact water has, according to their answer, been furnished to two hundred and fifty-six acres more land owned by others than to lands purchased from the company, besides all of the water that has been furnished to National City and its inhabitants.

And it must be remembered in this connection that the defendants, in their answer, expressly aver that they are entitled to this water right and admit *that* they are liable to pay an annual rental, which could not be so if this company were dealing in water owned by it in private right. The allegation is:

"These defendants admit that each defendant has become the owner *of a water right* to a part of the waters *appropriated and stored by said company*, necessary to irrigate his tract of land, *and that each defendant is liable to pay for the use of said water a yearly rental, such as said company is entitled to charge and collect.*',

Ans. p. 8, line 27.

They go further and allege that they are also entitled to water for domestic use, and that their

"water right embraces the right and easement of the service of the reservoir and distributing system of said corporation for the delivery of the water at and upon their respective lands."

In short they aver their right to everything to which they would be entitled, if it were such a corporation as they insist it is not, viz. a *quasi* public corporation dealing in the water, under the constitution, as a public use.

Their idea that they have become part owners of the company's plant by way of "freehold servitudes," as well as their claim that the company is a private one, and not subject to the constitution, seem to have been conceived even after they filed their answer. There seems to be nothing new in the argument in this brief on this question and to answer it further would be only to repeat, in substance, what has already been said in reply to the other brief.

XII.

With respect to what is said in point IV of this brief in regard to deeds made since December, 1892, in which the company expressly sold and conveyed water rights the learned solicitor is mistaken in his statement that it is upon the promise in this deed, to pay an annual water rental that our argument is built. We do not understand that this express promise to pay an annual rate affects the legal *status* or liability of the parties in the least. By section 552, when the company which had appropriated the water, sold the land under its system, the water right passed with the land *subject to the payment of the annual rental.* The

section so provides in express terms. Therefore the promise to pay this annual rental became a part of the contract by operation of law, and was just as binding as if so stated. So, where the water was put upon the land voluntarily, and without compensation. But when the company came to sell this water right and charge a consideration for it, the terms upon which it was sold were set out in the conveyance, and very properly so. What we did say, with respect to these contracts, in substance, was that the defendants were claiming their rights under contracts made with the company which precluded it from charging an annual rental, but that the only *contracts* alleged in the answer as having been made with the company, were the ones above mentioned, and that they did not confine the rate to $3.50 per acre per annum but left the rate to be fixed by the company in pursuance of, or as prescribed by law, as it necessarily must be in all cases. It was only to this extent that our argument was built upon these contracts. It was intended to show that the only contracts made by the company had no such effect as they claimed for them.

Of course it would be absurd, as counsel say, to construe such a contract to authorize the company to charge any price for the water it pleased. Such contracts,authorizing the company to fix the rates,whether expressed in the contract or incorporated into it by operation of law, must, by implication of law, be limited to the fixing of reasonable rates. And if the rates established are unreasonable the consumer may have the rate abrogated and a new one fixed by the

board of supervisors. It is proof evident that the rate established by the company, in this case, is not unreasonable, that the defendants would have applied to the board of supervisors, where they could have the question settled before this case could be put at issue.

But, if it is absurd to claim that such a contract gave the company the right to establish any rate it pleases is it not more absurd to say that the contract actually fixes the rate at $3.50 per acre when that sum is not even mentioned in the contract? The trouble is that in order to make their case appear stronger, the necessity of which we concede, counsel will persist in attributing to us claims that we have never made or even hinted at, and this is one among the many. We have never claimed that the company can fix any rate it pleases. And the calamities that might result, if the company should be accorded the power to fix the rates, as depicted by counsel, are soul harrowing in the extreme, but fortunately they are purely imaginary and we can, with perfect safety, assure counsel that they will never happen. There is nothing in the conduct of this company to warrant any such assumption. The company fully realizes that it cannot charge such a rate as will discourage the planting and improvement ment of property under its system, which would be more disastrous to it than to any of the defendants. The company believes, and we believe, after the most careful consideration of the subject, that, at the rate of $7.00 per acre per annum it cannot make one dollar for its stockholders out of the sale of water. That

amount it hopes will just about save it from actual loss, growing out of the operation and maintenance of the plant, and its depreciation. And it believes, and we believe, that this sum can be met by the consumers without distressing them. At the time the $3.50 rate was fixed the lands of the defendants were in a wild state and unimproved. They must wait several years before receiving any returns from their trees. Now, in the case of most of them, their trees are in bearing and they can pay the rate fixed without any injustice to them. On the other hand, to compel the company to continue to furnish water at the old rate, will be absolutely ruinous. Under these circumstances their dire predictions of future disaster is, to use their own language, "moon shine."

And the insinuation of counsel that his associate solicitors, and other of his clients, are "unsophisticated grangers," whose minds would dwell upon and advert to advertising circulars of the company announcing that water would be furnished at $3.50 an acre is unfounded. One who could write such a brief as the one presented by his associates in this case may be a visionary but he cannot be classed with the unsophisticated. And we rise in the defense of his other clients to say that a more intelligent and well informed community cannot be found anywhere. The only thing that we know of against them is that they are not willing to pay reasonable water rates. And if any of these defendants have relied upon an advertising circular, if there ever was one of the kind counsel intimates, they possess much less intelligence than we give them credit

for. And the attempt to make these imaginary advertising representations a part of a written contract in order to vary the meaning of plain terms shows the extremity to which counsel are driven. That the company should have charged for a water right and then assumed to raise the annual rates is made another ground for complaint. But while we do not understand why this should not be done this complaint rests upon a very slender foundation. As a matter of fact water rights have been sold for only two hundred and twenty acres and some of the defendants who bought these rights have expressed their willingness to pay the new rate and asked to have the suit dismissed as to them which has been done. As compared with the defendants who have had the right to the perpetual flow of the water attached to their land for nothing these interests are as nothing. Under all the circumstances it will be better to stick to the plain law rather than attempt to swerve from it on the plea of hardships assumed to exist and so ill founded.

The classification of different consumers, as made by the company, has been referred to in both briefs, as if it had some bearing on the question involved here. All of the defendants fall under the first class which includes persons who have acquired water rights. The other class covers those who have not acquired water rights, and these are required to pay an additional amount, equal to six per cent. interest on what the company had fixed as the value of the water right and which those of the first class had paid, or secured without paying for it.

There is no complication in these contracts as counsel assume. In many instances the company furnishes water for temporary purposes, contracting that such use shall not give the party a water right. These temporary takers, and it may be others, who have not acquired a water right are, under the classification, required to pay an additional amount, which is made uniform, and is intended to put them on an equal basis with those who have paid for the water right. This is done by charging them interest on the amount that has been paid by the other class and not by them. This was done, as we now remember it, to accommodate some water takers in National City who preferred to take water in that way rather than pay for the water right.

XIII.

The question whether the bill shows the danger of a multiplicity of actions, sufficiently to give this court jurisdiction, is raised and discussed at considerable length. In this discussion it is assumed that the allegation that a multiplicity of suits are threatened is the only ground of jurisdiction. But this is not true. Irrespective of the ground of multiplicity of suits the question of the right to establish and charge water rates and the reasonableness of such rates are matters of equitable cognizance and, the parties being citizens of different states, of federal jurisdiction.

But if this were not so, if the dangers of a multiplicity of suits is a sufficient ground of jurisdiction in any case, and this is not disputed, there could be no clearer, or stronger, case than this. In the classes of

cases of multiplicity of suits which will give jurisdiction, as set out in Pomeroy's Equity, and copied in the brief on the other side, is the following:

"Where the same party has, or claims to have, some common right against a number of persons, the establishment of which, regularly, requires a separate action brought by him against each of those persons, or brought by each of them against him, and instead thereof he may procure the whole to be determined in one suit brought by himself against all the adverse claimants as codefendants."

Counsel say this is the class, if any, under which this suit may be maintained. And certainly it covers this case exactly. The defendants here number over two hundred, we believe. One remedy of the complainant was to shut off the water from the premises of each of the defendants if they refused to pay the established rate. The other was to sue each one of them for the amount of his water bill. If it had pursued the former remedy each of the defendants could have brought separate actions for a mandamus to compel it to turn on the water. In the latter the company would have been compelled to bring a separate suit against each water consumer. In neither case would an adjudication have been binding upon any other water consumer. Consequently, unless some one should have been willing to submit, without being compelled to do so over two hundred actions at law would have been necessary to settle a question that can be better settled by this court in one suit. The expense that would have accrued and the annoyance of such litigation in the community could hardly be overestimated.

But it is claimed that, aside from the allegation of a threatened multiplicity of suits, the bill contains no

cause of action. If so counsel could much more conveniently have raised the question by demurer to the bill. But we hardly think this point is seriously made. Here are the very important questions: 1. Whether the company has the power to change its annual rates of charges for water. 2. Whether the rates established are reasonable. The last issue is raised, or attempted to be raised, by the defendants in their answer. If they are right that the question can be determined by this court, in the first instance, there must be a decree upon the issue as to the reasonableness of the rates. And in either event the court is called upon to determine whether the defendants have this right or not.

As to the question of the power of the company to change the rate it involves necessarily an adjudication of its right to collect it. Such an adjudication would cover exactly what would be litigated in the two hundred and more actions brought to collect the rates, and would bind all parties upon the issue of the right to collect them. So as to the separate mandamus proceedings to compel the turning on of the water.

Again it is claimed that the cause of action here is not common to all of the defendants because they claim under different contracts. But the difference in the contracts in no way affects the question of the right of the company to establish and collect the annual rate. The defendants make common cause against us and aver in their answer that we have placed them all on the same footing as to the annual

rates and therefore the defense made by one may *be* made by all.

Ans. pp. 16-18.

They allege that they are all the owners of water rights and that for that reason they can not be required to pay this rate.

Ans. pp 8-9.

The fact that none of the defendants make any defense, special to themselves, is amply sufficient to show that the cause of action is common to them all, if there were any question about it.

XIV.

With respect to the effect of section 552, counsel takes the singular position that where water is made appurtenant to particular land, it ceases to be a public use, and that therefore the section referred to was not intended to deal with water appropriated as a public use. Such a doctrine would revolutionize the water laws of this state. According to that view, so long as the right to use the water is floating around loose, and unattached to any land, it is a public use, but whenever any land owner is fortunate enough to corral it on his land it passes out of the control of the constitution and laws and becomes a private use. And in order to constitute a public use in water, and continue it as such, it must be open to a scramble on the part of the whole public, and no part of it can ever be made appurtenant to land. Well, we must confess that to us this is a most startling proposition. Counsel who write the other brief

earnestly maintain that the water is never appropriated at all until it is actually applied to the land. Therefore it cannot become a public use under the constitution because it is only water *appropriated* for sale, etc., that is made a public use. They further maintain, that, by getting the water on his lands, that is to say, by appropriating it, the land owner becomes entitled to its use, perpetually; that it becomes appurtenant to his land. The other counsel says that whenever it becomes appurtenant to the land, that is to say, when it is appropriated it ceases to become a public use. Thus, under the constitution appropriating the water makes it a public use and according to counsel the same act converts it from a public to a private use. It is plain to be seen, now, why these learned solicitors wrote separate briefs. They do not seem to be able to get themselves together. And the reasoning of one destroys that of the other whenever they get onto the same subject. The results of their combined reasoning, if followed to conclusions, would certainly produce startling results.

It is further claimed that the statute cannot apply where there has been an actual contract. This we do not concede. The rates are matters not subject to private contracts, as we have shown in reply to the other brief. But if this were not true no contracts were made in this case. We are called upon to make this statement again and again because counsel constantly *assume* that such contracts were made. But we have now learned, for the first time, on what they base this assumption. It is said in this brief that the statute of

1885 requires, in order that the rates fixed by the company shall become operative that the company shall not only *establish* the rates but it must also *collect* them, and when the consumers permit them to be collected they thereby *consent* to them; the minds of the parties have met, and the rates are thereby fixed *by contract.* We cannot but admire the ingenuity of this argument, but it can hardly be looked upon as convincing. As we have said before, if it is a contract it must be binding on both parties and neither could, by their voluntary act, abrogate or set it aside. But even the learned solicitors on the other side will not contend, for one moment, that, notwithstanding the establishment of the rates in this manner, the consumers might not, the very next day, apply to the board of supervisors and have them abrogated and new ones established. And the statute, itself, expressly provides for the fixing of the rates, more than once, by the company; before they are established by the board of supervisors, and after that body has abrogated its own rates.

Stat. 1885 p. 97, Sec. 5.

So if the consumers are not satisfied with their first "contract" they can have the board of supervisors abrogate it. After the board has established the rates they can be asked to abrogate them, and if they do so, the company must make a new "contract" with the consumers by establishing the rates and *collecting* them And if the consumers refuse to pay the rates as they are doing now, of course the contract cannot be made. Their voluntary consent is necessary to

make a valid contract, according to their reasoning. It follows, that in that case, the company could never collect any rates, for the reason that by the terms of the constitution it can only exercise its franchise of collecting rates *as prescribed by law* and the only two ways prescribed are through uniform rates established either by the company or by the board of supervisors. The position of counsel, when followed out to its logical and necessary results, not only makes the statute of 1885 unconstitutional, but renders it so absurd as to be positively ridiculous. There can be no doubt that the use of the words "establish" and "collect" were used to cover the same thing by the rates the company may put in force. And the necessity of changing and re-establishing the rates is recognized by the statute when fixed by the board of supervisors, and provision is made for such change. The same necessity must exist in case the rates are established by the company. It was not expressly provided for because it is always open to the company, subject to the restraints provided by law, which have existed since the statute of 1862.

Beside the necessity for the change of such rates, mentioned heretofore, growing out of increased expenditures for the public good and convenience, there is every reason why a corporation might, for the encouragement of improvements, submit to the loss growing out of low rates, while orchards are in planting, and early growth, where the land owner is receiving no returns, and later on, when the orchards are productive expect, and demand, a more remunerative rate.

And this is precisely the condition of things here. And yet counsel declare that a law that would allow a company to change its rates, subject at all times, if it fixes an unreasonable rate, to the action of the board of supervisors, would be "monstrous and unreasonable." We confess our inability to see the monstrosity, or unreasonableness, of such a law even after reading the able, plausable, and persuasive argument of the learned solicitor, who characterizes it as such. But we are pleased to see that he points out specifically in what respect the statute, so construed, is unreasonable and monstrous. It is because it requires, in order to bring about action by the board of supervisors, that 25 citizens and tax payers shall petition therefor, and he seems to fear that the necessary number, willing to petition, could not be found. This is simply getting back to what has been the chief stock in trade of both of the defendants' briefs viz: imaginary hardships and difficulties. But it would hardly be a difficult matter, if a whole community of people were being oppressed by high rates, to secure 25 petitioners for relief. And certainly it would not be, in this case, where over 200 defendants have employed numerous and able counsel to enter upon a long and expensive litigation for their claimed rights, and where their rights, if they are being invaded, could be protected by a most simple, inexpensive and speedy proceeding before the board of supervisors.

But the secret of it is disclosed in the brief of the other solicitors. It is not because they cannot muster sufficient force to appeal to the board of supervisors,

but because they do not want to. They protest, earnestly, that it would be monstrous to compel them to resort to the remedy that the law has provided for them. The hardship they fear is that justice may be done them. If the fear of the other learned solicitor, that 25 citizens could not be found to act, in any case, which is not likely if there should be good ground for it, is realized, the legislature might properly be asked to amend the law, but this court cannot misconstrue its plain provisions to give relief when no relief is needed. But counsel very inconsistently insists, after contending that 200 and more consumers cannot raise the necessary 25, that *one* consumer, the company, as a land owner, may do so. But the company is not complaining of the rates established, therefore it has no cause to petition. The argument is exceedingly far fetched.

But counsel claims that it is absurd to say that it was intended by the constitution that rates which must be established, as prescribed by law, should be established by the mere act of the company itself. This power, on the part of the company to fix the rates, was not, at the time the constitution was adopted, absolute or unlimited, nor has it ever been since. Under the statute of 1862, as we have shown, it was subject to the action of the board of supervisors, and has been so ever since, and is so now. But we can see no reason why the constitution should not have contemplated, that until action should be taken by the board, rates established by the company should prevail. Certainly the law making power has so con-

strued it, and prescribed that as one of the modes of establishing the rates, and that construction has stood unchallenged, so far as we know, for over ten years. The force of this point, as against the statute as it stands, which is perfectly reasonable and just, not appearing to be sufficiently strong, he proceeds to conjecture what the legislature might do by giving the company unlimited and unconditional power to establish the rates. But it is sufficient to say that the legislature has, as yet, done nothing of the kind, and it is reasonably certain that it never will. If it does it will be time enough then to question its power.

The point made, that the constitution should receive a practical and common sense construction is well taken. We have no right to ask anything else. But we think this test will effectually set aside counsel's construction of this article of the constitution. And we submit that the statute of 1885 is in strict conformity to its provisions.

But the inconsistency of this position, as compared with others taken by them is quite apparent. They contend, in this connection, that the company has no power to establish the rates. In other parts of their brief they insist with great earnestness and apparent sincerity that the company *has*, since the constitution took effect established the rates, that the defendants have acquiesced in them, and that all parties are absolutely bound by them even to the exclusion of the right of the municipal authorities to interfere. When the company establishes rates that suit the defendants, the power exists, but when it proposes to fix

rates not satisfactory to them it cannot do so, because the rates must be fixed by the municipal authorities, and a law that permits them to be established by the company is in violation of the constitution because the fixing of rates is a "municipal function." These gentlemen should keep to the right, and not run into each other in this way. We find it exceedingly difficult to follow them in their meanderings. They cross each others tracks at every turn and their turnings are numerous. But even in this brief the old complaint, that to compel them to apply to the board of supervisors, and then, if the rates are not satisfactory, to the courts for redress, is too great a hardship, is reiterated. It ought to be sufficient answer to this to say that this is the remedy given them by law, and that the court cannot give them a different one, because this one may not be quite satisfactory in the present case. But in order to prove the hardship they assume that the board of supervisors will fix an unreasonably high rate, and thereby compel them to appeal to the courts. They may so assume, in argument, if they have nothing better, but the court can entertain no such presumption.

The case of McCreery *v.* Beaudry, 67 Cal. 120, cited by counsel, seems to have no particular bearing, except that it holds just what we are attempting to maintain here, viz., that "each" member of the community "*by paying the rate fixed for supplying it,* has a right to use a reasonable quantity of water in a reasonable way." And it is equally true that "water appropriated for distribution and sale is *ipso facto* a public use,

which is inconsistent with the right of the person so appropriating it to exercise the same control over it that he might have exercised if he had never so appropriated it." The decision is directly in line with our contention, and diametrically opposed to theirs, to the effect that the company appropriating the water may contract and deal with it as if it were its own private property.

XV.

But the learned solicitor next effectually knocks the props from under the argument of his associates by his declaration:

"It is *not our claim* that the company *is estopped to change the rate by reason of the fact that it has established and collected a lower* rate; but we claim that in so far as the company is engaged in furnishing water *for public use, it has no right to make rates at all, either in the first instance* or by way of changing them after they have once been adopted; that in so far as the use is private, and the right arises out of a contract, or deed, the rate fixed by the contract controls, and the rights vested by the deed, at the time it is made, cannot be changed by one party to it."

This leads back to the original controversy as to the nature of the use in the water, whether public or private. We submit that their answer avers the use, in this case, to be public, and that we have clearly demonstrated it to be so, in the earlier pages of this brief. This being so it is broadly admitted that the company is *not estopped by establishing and collecting the $3.50 per acre rate to change and increase the rate.* This is just what we have been laboring to prove, and the contrary, if we have not misunderstood their brief, throughout, is the bulwark of their defense, as maintained by his associate solicitors. With this admission the question becomes a very simple one. Does the statute, in the

absence of action on the part of the board of supervisors, authorize the company to establish and change its own rate, until such action is taken, and if so is this provision of the statute constitutional? That the statute authorizes this mode of establishing the rates, in clear and unambiguous terms, there can be no question. There is no intimation anywhere that the consent of consumers or their acquiescence therein is necessary to the establishment of the rates. But they say such mode cannot, legally, be authorized, because the rates must, by virtue of the constitution, be fixed as "prescribed by law." The answer is that this *is* the manner prescribed by law. And we see no reason why the legislature might not prescribe that, until the consumer should ask the board of supervisors to fix the rate, the same might be fixed by the company, the rates so fixed to be subject to action by the board, abrogating the same. There is nothing inimical to the constitution in this, that we can see, and it seems to us to be entirely just and reasonable. If the consumer is not satisfied, his remedy, by petition to the board, is open to him.

Counsels' position is further stated thus:

"In short we claim that nothing in the constitution, or the laws, forbids parties from dealing with each other in respect to *water rights* in such way as to establish the rights of both parties, by contract, but that where the use is left, by the contract, *one which is a public use*, or a right that belongs to the rest of the public, that then the power to regulate and control belongs to the state; and when the statute has said that rates, as fixed in a certain manner, shall obtain until the public authorities themselves act, or after their action has been abrogated, *this does not mean that the rates become forever fixed by the contract and beyond the state control.*"

Brief p. 28.

This is precisely our contention, most admirably and clearly stated. We are obliged to counsel for this material strengthening of our feeble efforts to meet the arguments of his associates. The matter of "water rights," as he says, is matter of contract and one consumer may obtain a preferred right to the perpetual flow of the water, where there is not enough to supply all the lands under the system. But the use of the water is none the less a public use and under the control of the state because he has contracted for this preferred right. The collection of the rates, by the company, for furnishing the water, is a "franchise" and can only "be exercised by authority of, and as prescribed by law." Therefore, as counsel says, the rates can only be established as the law prescribes, and, if fixed by the company cannot be binding forever. But unfortunately his associate counsel contend that they *are* binding forever. We feel assured, however, that with his assistance we have sufficiently shown the fallacy of that reasoning.

Counsel closes by saying:

"As to the argument in the brief, based upon the supposed reasonableness of the charge of $7.00 an acre, with all of the collateral facts that are of importance, in that calculation, I leave to my associates."

The other solicitors have not *said* we leave this task to associate counsel, but in fact they *have* left it to him, and both of them have left it to the court. But, as there is nothing in the answer to show that the rate is unreasonable. it will not be a difficult undertaking.

We were to have been favored with another brief,

by still another of the solicitors, and extended him additional time, by stipulation, but the time has long since expired and the brief is not in. Perhaps this branch of the subject was left to him. If so the effort to prove the rate to be unreasonable has evidently been too much for him and he has fallen by the wayside.

But we submit, that there is no issue raised by the answer as to the reasonableness of the rates, except upon the bases of their claim that they are not bound to pay any "net profits."

In conclusion we must enter an apoligy for the length of ~~their~~ this brief. Our excuse is, in part, that the solicitors for the defendants have led us into the discussion of mere abstract questions, not material to the case, as we believe, but which we do not feel it proper to ignore, and in part that the questions involved are exceedingly important and deserve the most careful and thorough consideration by counsel, and by the court.

Respetfully Submitted,

WORKS & WORKS,

Solicitors for Complainant.